PATRICK KEVIN MULDOWNEY

v.

AUSTRALIAN ELECTORAL COMMISSION

HIGH COURT, AUSTRALIA (SITTING AS THE COURT OF DISPUTED RETURNS)
BRENNAN ACJ
25 JUNE 1993

ELECTION LAW: Application for declaration that elections void - Whether petitioner was qualified to vote - Whether petitioner qualified to vote in election for a Division - Whether there were illegal practices.

The petitioner sought declarations that the whole of the general election for members of the House of Representatives held on 13 March 1993 was null and void and that none of the candidates returned were duly elected. The basis for disputing the elections was that the Electoral Commission sought to prevent advocates of informal voting from attempting to influence voters to vote informally and that the Commission thereby committed undue influence and other illegal practices based on the argument that s. 329A of the Commonwealth Electoral Act 1918 (the Act), which prohibited the dissemination of material with the intention of encouraging electors to vote informally at elections for the House of Representatives, was said to be *ultra vires*.

The Electoral Commission applied to set aside the petitions on the grounds that at the time of the general election and the election of Senators for the State of South Australia, the petitioner was not on the Roll for the Division of Boothby or any other division in South Australia and as such was not qualified to vote for the election in the Division of Boothby or for the election of Senators for the State of South Australia. The Commission thus argued that the petitioner fell foul of ss. 355(c) and 358 of the Act which required that every petition disputing an election should be signed by a person who was qualified to vote at the election in dispute in breach of which no proceedings shall be had on the petition.

The Commission further argued that at the time the alleged conduct was committed, s. 329A of the Act had not been declared invalid and the Court was therefore not empowered to declare an election void on the ground alleged in the petitions.

Held:

[1] The definition of elector denies the status of elector at a given time to a person whose name does not appear on a Roll at that time. Qualification for enrolment is not a qualification to vote, even though the only additional element in the qualification to vote is the appearance of the electors name on the Roll for a Division. Enrolment is not merely evidence of an elector's qualification to vote; enrolment is itself a qualification to vote. A qualification to be enrolled without enrolment falls short of a qualification to vote.

[2] As the petitioner's name did not appear on a Roll on the date on which any of the elections referred to in the petitions was held, the petitioner was not qualified to vote at any of those elections. Accordingly there can be no proceedings had on either of the petitions and the Commission was entitled to have the petitions set aside.

[3] Both the petitions did not comply with the requirements of s. 355(c) of the Act and consequently, pursuant to s. 358 of the Act, no proceedings can be had on either petition.

[Petitions dismissed with no order as to costs].

Cases referred to:

Reg. v. Pearson; Ex Parte Sipka [1983] 152 CLR 254, at p. 260 ***(refd)***
Meffert v. Brown [1909] 116 SW 779 ***(refd)***
Piuser v. Sioux City [1935] 262 NW 551 ***(refd)***
Gilbert v. Breithaupt [1940] 104 P. (2d) 183 ***(refd)***
Re Surfers Paradise Election Petition [1975] Qd R. 114, at p. 117 ***(refd)***
McKenzie v. The Commonwealth of Australia [1984] 59 ALJR 190, at p. 191; 57 ALR 747, at pp. 749-750 ***(refd)***

Legislation referred to:

Acts Interpretation Act 1901 (Cth), s. 13(1)
Australian Act, ss. 8, 30, 32, 75(v), 163(1)(c)(ii)
Australian Capital Territory Representation (House of Representatives) Act 1973
Commonwealth Electoral Act 1918, ss. 4(1), 41, 93(1)(2), 154, 155, 156, 160, 208, 221, 235, 329A(3), 354(1), 355(c), 358, 361(1), 362, 367(a)
Commonwealth Franchise Act 1902
Elections Act 1915-1973
Northern Territory Representation Act 1922

JUDGMENT

Brennan ACJ:

Two petitions to the Court of Disputed Returns were filed in the Registry of the High Court by Patrick Kevin Muldowney, the petitioner. By s. 354(1) of the Commonwealth Electoral Act 1918 ("the Act"), the High Court is appointed to be the Court of Disputed Returns and its jurisdiction is prescribed by Pt XXII of the Act. The first petition, identified as No. C9 of 1993, relates to the general election of members of the House of Representatives held on 13 March 1993 and the supplementary election for the Division of Dickson held on 17 April 1993. This petition seeks the following relief, *inter alia*:

1. A declaration that the whole general election for members of the House of Representatives, including the supplementary election for the Electoral Division of Dickson, was absolutely void and none of the candidates returned were duly elected.
2. Alternatively, declarations that so much of the general election as may have been affected by the matters referred to in this petition was void and that each of the candidates returned whose election or return may have been affected was not duly elected and the election and return in each corresponding Electoral Division was absolutely void.

The second petition, identified as No. C10 of 1993, relates to the election of six senators for the State of South Australia held on 13 March 1993. This petition seeks the following relief, *inter alia*:

1. A declaration that the whole election for six Senators for the State of South Australia was absolutely void and none of the candidates returned were duly elected.
2. Alternatively, declarations that so much of the Senate may have been affected by the matters referred to in this petition was void and that each of the candidates returned whose election or return may have been affected was not duly elected.

The same allegations are made in each petition as the basis for disputing the elections to which the petitions respectively refer. The gravamen of the allegations relevant to the present proceedings is that the Australian Electoral Commission ("the Commission") sought to prevent advocates of informal voting from attempting to influence voters to vote informally and that the Commission thereby "committed undue influence and other illegal practices based on s. 329A". Section 329A of the Act which, in effect, prohibits the dissemination of material with the intention of encouraging electors to vote informally at elections for the House of Representatives is said to be *ultra vires*. The petitions nominate the Commission as respondent.

The Commission applies on summons for orders that -

1. The whole of the petitions in proceedings C9 and C10 of 1993 be set aside on the ground that, as the petitioner was not, at the time of the general election and the election of Senators for the State of South Australia, on the Roll for the Division of Boothby or any other Division in South Australia, the petitioner was not qualified to vote for the election in the Division of Boothby or for the election of Senators for the State of South Australia.
2. If the petitioner was qualified to vote in an election for a Division for a member of the House of Representatives the petition in proceeding C9 of 1993 should be set aside insofar as it challenges the election of members of the House of Representatives in other Divisions.
3. The whole of the petitions in proceedings C9 and C10 of 1993 be set aside on the ground that, at the time the alleged conduct was committed, sub-section 329(3) and s. 329A of the Commonwealth Electoral Act 1918 had not been declared invalid and the Court of Disputed Returns is therefore not empowered to declare an election void on the ground alleged in the petitions.

The first two grounds relied on reflect the provisions of s. 355(c) of the Act which requires that every petition disputing an election should be signed by a person "who was qualified to vote" at "the election in dispute" If that requirement is not complied with, s. 358 provides that "no proceedings shall be had on the petition" The third ground, which was transformed in the course of argument, is intended to raise the question whether the allegations made against the Commission in the petitions are capable of amounting to an illegal practice which might found a declaration that the disputed elections are void.

It is convenient to deal with these questions *seriatim*.

Qualified to vote

The petitioner asserts that he was qualified to vote at the disputed elections as an Australian citizen who had attained the age of 18 years and who has lived since 1991 and still lives at 111 Bradley Grove, Mitchell Park, in the Electoral Division of Boothby in the State of South Australia. Affidavit evidence, which the petitioner does not challenge, shows that he had been on the electoral Roll for the Division of Kingston in South Australia prior to 31 July 1989 but, on that day, his name was removed from that Roll. The petitioner accepts that his name was not on the Roll for any Division on 13 March 1993. On 11 June 1993 - after the disputed elections - he was enrolled for the Division of Boothby in the State of South Australia. Although the petitioner's name did not appear on any Roll on 13 March 1993 or on 17 April 1993, he claims to have been "qualified to vote" at an election on those dates. He asserts that he would also have been "entitled to vote" at an election on those dates but for the fact that his name was not on the Roll for a Division .

Part VII of the Act - "Qualifications and Disqualifications for Enrolment and for Voting" contains s. 93(1) and (2) of the Act which prescribe the conditions of entitlement to be enrolled and to vote:

> (1) Subject to subsections (7) and (8) and to Part VIII, all persons:
>
> (a) who have attained 18 years of age; and
>
> (b) who are:
>
> (i) Australian citizens; or
>
> (ii) persons (other than Australian citizens) who would, if the relevant citizenship law had continued in force, be British subjects within the meaning of that relevant citizenship law and whose names were, immediately before 26 January 1984;
>
> (A) on the roll for a Division; or
>
> (B) on a roll kept for the purposes of the Australian Capital Territory Representation (House of Representatives) Act 1973 or the Northern Territory Representation Act 1922;
>
> shall be entitled to enrolment.
>
> (2) Subject to subsections (3), (4) and (5), an elector whose name is on the Roll for a Division is entitled to vote at elections of Members of the Senate for the State that includes that Division and at elections of Members of House of Representatives for that Division.

Sub-sections (3) to (8) inclusive of s. 93 prescribe various grounds of disentitlement to be enrolled or to vote, none of which is of present relevance. Although the petitioner does not contend that he was "entitled to vote" at any of the elections in dispute, his Counsel submitted that he was "qualified to vote" in the sense of possessing the qualities which confer an entitlement to enrolment and, upon enrolment, an entitlement to vote. A qualification to vote is said to depend upon personal attributes, while an entitlement to vote depends upon the due performance by the Commission of its function of keeping an accurate Roll. In order to illustrate the supposed difference between a qualification to vote arising outside s. 93(2) and an entitlement to vote conferred by s. 93(2), Counsel referred to s. 41 of the Constitution which reads:

> No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

However, this section does not prescribe a qualification to vote. As Gibbs CJ, Mason and Wilson JJ. said in *Reg. v. Pearson; Ex parte Sipka* [1983] 152 CLR 254, at p. 260 this section "prevents the Commonwealth Parliament from taking away a right to vote; it does not create an entitlement which does not otherwise exist". In the same case *(ibid*., at pp. 279, 280), Brennan, Deane and Dawson JJ identified the right protected by s. 41 as "the constitutional franchise conferred by ss. 30 and 8" of the Constitution on persons entitled prior to the Commonwealth Franchise Act 1902 to vote for the more numerous House of a State Parliament Their Honours referred to the successive Commonwealth Acts which had complied with the prohibition contained in s. 41 and noted that the practical effect of s. 41 is spent. Thus a right to vote in an election for the Senate or the House of Representatives now depends entirely on the Act. That being so, the qualifications to vote must

be found in the Act. By force of s. 93(2), the qualifications include enrolment on a Roll for an Electoral Division. Indeed, the term "elector" is defined by s. 4(1) to mean "any person whose **name appears on a Roll** as an elector". The only **right** to vote conferred by the Act is that conferred by s. 93(2) and that right depends on the elector's name being on the Roll for a Division. The elections at which the right to vote may be exercised are defined by reference to the Division (and the State that includes the Division) on the Roll for which an elector's name appears (ss. 93(2), 221).

There is no undue hardship or anomaly created by insisting on enrolment as a qualification to vote. If a person's name is wrongly removed or is wrongly omitted from a Roll, Pt X of the Act provides a comprehensive remedy by way of administrative review. And s. 75(v) of the Constitution ensures, of course, that a decision to remove or to omit a name from a Roll is amenable to judicial review. The Roll is pivotal to the electoral system created by the Act: the Roll closes 7 days after the issue of a writ for an election (s. 155) before the date fixed for the nomination of candidates (s. 156). The Roll is the source of the certified list of voters issued for use by presiding officers at polling places (s. 208) and determines the entitlement of an elector to vote (s. 93(2)) in a particular Division in the case of a House of Representatives election or in a particular State or Territory in the case of Senate election (s. 221). In proceedings before this Court to dispute an election, the Court may inquire into the identity of a person with a name appearing on the Roll but is forbidden to inquire into the correctness of the Roll (s. 361(1)). The definition of elector (s. 4(1)), as we have seen, denies the status of elector at a given time to a person whose name does not appear on a Roll at that time. Qualification for enrolment is not a qualification to vote, even though the only additional element in the qualification to vote is the appearance of the elector's name on the Roll for a Division. Enrolment is not merely evidence of an elector's qualification to vote; enrolment is itself a qualification to vote. (Section 93(2) of the Act is radically different in this respect from the constitutional and statutory provisions considered in *Meffert v. Brown* [1909] 116 SW 779, *Piuser v. Sioux* City [1935] 262 NW 551 and *Gilbert v. Breithaupt* [1940] 104 P. (2d) 183). A qualification to be enrolled without enrolment falls short of a qualification to vote.

That conclusion is reinforced by a consideration of the provision made by the Act for permitting a person to vote if that person's name has been wrongly omitted from the Roll due to an error made by an "officer" (a term broadly defined in s. 4(1)). Such a person may cast a provisional vote (s. 235) at a polling booth and the vote may be included in the scrutiny (Sched. 3 para 6(c), 10(b), 11(b), 12, 18, but inclusion in the scrutiny is subject to para 13) if the Divisional Returning Officer is satisfied, after making inquiry, that two conditions are satisfied: first, that the person casting the provisional vote (inappropriately termed "the elector") "was, at the time of voting, entitled to be enrolled for the Division"; and, secondly, that the person's name was omitted from the Roll "due to an error made by an officer or to a mistake of fact" (Sched. 3, par. 12(b)). If "qualification to vote" were synonymous with qualification to be enrolled, the second condition would be unnecessary. The satisfaction of the second condition depends on the occurrence of an error in the procedure for enrolment which, had it not occurred, would have resulted in an entitlement to vote. Section 367(a) of the Act accordingly draws a distinction between a person "entitled" to vote and a person "permitted" to vote.

Counsel for the petitioner points to an anomaly in the Act if his submission be rejected. Section 163(1)(c)(ii) qualifies for nomination for election an Australian citizen of 18 years or over who is qualified "to become" an elector on a Divisional Roll. The nomination of such a person could be wrongly rejected and it is said that there would be an anomaly if that person, being denied the status of a candidate and not being a person "qualified to vote", were prevented by s. 355(c) from disputing the election before the Court of Disputed Returns. The anomaly would arise only on a remote contingency. It provides no sufficient reason for failing to equate the terms "qualified to vote" in s. 355(c) and "entitled to vote" in s. 93(2). The heading to Pt VII (which is part of the Act: Acts Interpretation Act 1901 (Cth) s. 13(1)) is a clear indication that no difference was intended to distinguish qualification to vote from entitlement to vote.

As the petitioner's name did not appear on a Roll on the date on which any of the elections referred to in the petitions was held, I hold that he was not qualified to vote at any of those elections.

Accordingly, there can be no proceedings had on either Petition No. C9 of 1993 or Petition No C10 of 1993. Therefore it is strictly unnecessary to consider either the second ground advanced by the Commission for the setting aside of Petition No C9 or the third ground advanced for setting aside both petitions. However, as the second ground was fully argued, I shall refer briefly to it.

Qualified to vote in an election for a Division

Petition No C9 disputes a general election and a supplementary election for the Division of Dickson. If the petitioner had been enrolled at the time of these elections, his name would have been on the Roll for the Division of Boothby. An elector whose name appears on the Roll for the Division of Boothby may sign a petition in compliance with s. 355(c) disputing the election of a member of the House of Representatives for that Division or an election of Senators for the State of South Australia but not a petition disputing an election of members of the House of Representatives for other Divisions or of Senators for other States or Territories. Counsel for the petitioner submits, however, that where the election in dispute is a general election, an elector's capacity to dispute the election is not so limited.

The Act, like s. 32 of the Constitution, makes particular provision for general elections of members of the House of Representative (see definition of "General election" in s. 4(1)). The Act prescribes what writs shall be issued for a general election (s. 154) and requires the polling in each Division to be fixed for the same day (s. 160). All writs are returnable on the same day (*ibid*). A copy of this Court's order on the trial of a petition disputing an election must be given to the Governor-General in the case of a general election (s. 369(b)). But none of these provisions indicates a dichotomy between a general election and the several particular elections which are held pursuant to writs for a general election. The particular elections are held for the election of members of the House of Representatives in the several Divisions, *albeit* the poll for each Divisional election takes place on the same day. The term "general election" is used in the Act as a collective term, descriptive of those particular elections which are held in each Division pursuant to writs for a general election. Thus, an election for a member of the House of Representatives for a Division which is to be held as part of a general elec-tion "wholly fails" if a candidate dies between the declaration of nominations and polling day (s. 180(2)) whereupon a new writ is issued for a supplementary election to be held on the Divisional Roll for the Election that has failed (s. 181). Presumably these were the provisions applicable to the election of a member of the House of Representatives for the Division of Dickson. No elector is qualified to vote at a general election; each elector is admitted to vote only for the election of a member of the House of Representatives for the Division for which he or she is enrolled (s. 221(2)).

The framework of the Act as well as the language of s. 355(c) indicates that the jurisdiction of the Court of Disputed Returns does not extend to the making of a declaration that the entirety of a general election is void. The jurisdiction to declare an election void on the petition of a person "who was qualified to vote thereat" is limited to those elections in which the petitioner was an elector entitled to vote. If a challenge on justiciable grounds can be mounted to the validity of a general election - a question that I need not consider - such a challenge cannot be entertained by the Court of Disputed Returns. (*Re Surfers Paradise Election Petition* [1975] Qd R, 114, at p. 117, suggests that a similar conclusion was reached under the Elections Act 1915-1973 (Q.) by Dunn J. sitting as an Election Tribunal). It may be that the High Court has such a jurisdiction but that has not been decided: see the dicta of Gibbs CJ in *McKenzie v. The Commonwealth of Australia* [1984] 59 ALJR 190, at p. 191; 57 ALR 747 at pp. 749-750

For this reason, I would uphold also the second ground advanced for the setting aside of Petition No. C9. It is unnecessary to consider whether, if the first ground had not been upheld, Petition No. C9 may have been held to comply with s. 355(c) in so far as it disputed the election for the Division of Boothby.

Illegal practices

The third ground advanced for setting aside the petitions focused on the allegation in the petitions that the Commission had actively pursued the policy inherent in s. 329A and had sought to implement it by warnings and otherwise although that section was invalid. It was submitted by Counsel for the Commission that, as s. 329A had not been declared invalid by any Court of competent jurisdiction, nothing done by the Commission by way of implementing that provision could amount to an illegal practice. I do not think it appropriate to rule on this submission. The provisions of the Act relating to the bases on which this Court may declare an election to be void on the ground of any illegal practice (s. 362) would require that, if I am to rule on the submission, I should construe other provisions of the Act and analyse with some precision the allegations contained in the petition. It may be that exercise would raise for determination the question whether the petitions comply with the requirements of par. (a) or par. (aa) of s. 355. The issues have not been fully explored in argument and perhaps such issues should not be fully explored in the absence of the members of the Parliament whose election the petitions seek to dispute.

In these circumstances, it is sufficient that I hold that Petition No. C9 of 1993 and Petition No. C10 of 1993 do not comply with the requirements of s. 355(c) of the Act and that, pursuant to s. 358 of that Act, no proceedings can be had on either petition.

I will hear further argument on the form of the order which must now be made.

(The parties considered that the appropriate order in each case would be to dismiss the petition under s. 360(1)(viii) with no order as to costs.)

I dismiss the petitions with no order as to costs.

REGINA

v.

NAILIE & ANOR.

HOUSE OF LORDS
LORD TEMPLEMAN, LORD LOWRY,
LORD BROWNE-WILKINSON,
LORD SLYNN OF HADLEY,
LORD WOOLF
26 MAY 1993

IMMIGRATION LAW: Charge under s. 25 Immigration Act 1971 - Offence of facilitating the illegal entry of persons into the United Kingdom - Whether offence proven - Appeal against acquittal of respondents by the Court of Appeal.

The first respondent had booked tickets for a group of Somalis relying on forged Tanzanian passports for that purpose. The group, upon interview by an immigration officer at Heathrow, claimed political asylum. The second respondent allowed the forgery of his wife's passport by the substitution for the original photograph, of a photograph of a woman and child and purchased airline tickets for three persons using the forged passport. During the flight, the second respondent took the passport back and upon disembarkation the three persons claimed political asylum. Both the respondents were found guilty and convicted by a jury of a charge under s. 25 of the Immigration Act 1971 (the Act).

Before the Court of Appeal it was not suggested that the travellers had practiced any deception and evidently they had not attempted to enter clandestinely. The Court of Appeal held that since there had been no attempt in either case by the other travellers to use forged passports, they could not have been illegal entrants and accordingly neither respondent could have facilitated the illegal entry of the persons concerned.

On further appeal, the Court of Appeal certified the following question of law of general public importance for determination:

> Whether a person seeking political asylum who disembarks from a ship or aircraft at a port in the United Kingdom without a valid passport or other document satisfactorily establishing his identity and nationality is on disembarkation an illegal entrant for the purposes of the Immigration Act 1971.